

No. PD-0388-21

IN THE  
COURT OF CRIMINAL APPEALS OF TEXAS  
AT  
AUSTIN, TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
10/28/2021  
DEANA WILLIAMSON, CLERK

SILAS PARKER,  
Appellant

v.

THE STATE OF TEXAS,  
Appellee

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On Appeal from Hays County in Case No. CR-18-0250 from the 274<sup>th</sup> Judicial  
District Court, the Hon. William R. Henry, Judge Presiding  
and the Opinion of the 3<sup>rd</sup> Court of Appeals in Case No. 03-19-00293-CR,  
Delivered the 22<sup>nd</sup> of April, 2021.

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**APPELLANT'S BRIEF ON THE MERITS**

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## IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) the following is a complete list of the names of the parties and their counsel.

<b><u>Party</u></b>	<b><u>Counsel</u></b>
<b>Appellate Panel</b>	Chief Justice Byrne Justice Gisela Triana Justice Edward Smith
<b>Trial Judge</b>	The Hon. William R. Henry 274 <sup>th</sup> Judicial District, Hays County
<b>Silas Parker</b> Defendant / Appellant	Mr. E. G. Morris & Ms. Angelica Cogliano 2202 Lake Austin Blvd, Austin, TX 78703
<b>The State of Texas</b> Prosecution / Appellee	Mr. Wes Mau, Hays County District Attorney's Office 712 South Stagecoach Trail, Suite 2057 San Marcos, Texas 78666

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## STATEMENT OF THE CASE

Silas Parker, Appellant, was charged by indictment for Possession of a Controlled Substance with Intent to Deliver in violation of Texas Penal Code § 481.113(e). The Defendant filed two motions to suppress.

The first Motion to Suppress Evidence was filed on September 19, 2018 (designated “First Motion to Suppress (House)”). CR at 8-9. In the First Motion to Suppress (House), Appellant requested the suppression of all evidence obtained pursuant to the search warrant issued on June 7<sup>th</sup>, 2017, allowing the search of and seizure of property from 2070 Lime Kiln Road in San Marcos, Texas (designated “First Search Warrant (House)”). *Id.* Appellant alleged that the First Search Warrant (House) was based on an affidavit (designated “First Affidavit (House)”) containing statements made in reckless disregard for the truth; and that without those statements, the affidavit failed to establish probable cause to support the issuance of the warrant. *Id.*

The Second Motion to Suppress Evidence was also filed on September 19, 2018 (designated “Second Motion to Suppress (Phone)”). CR at 27-29. In the Second Motion to Suppress (Phone), Appellant requested the suppression of all evidence obtained pursuant to the search warrant issued on June 21<sup>st</sup>, 2017, allowing the search and seizure of all electronic consumer data relating to phone number 830-385-8137 (designated “Second Search Warrant (Phone)”). *Id.* In Paragraph 3, Appellant alleged that the Second Search Warrant (Phone) was based on an affidavit (designated “Second

Affidavit (Phone)”) containing facts stemming from the illegal search and seizure conducted pursuant to First Search Warrant (House), and therefore constituted “fruit of the poisonous tree.” *Id* at 28. In Paragraph 4, Appellant also alleged that the Second Affidavit (Phone) did not contain facts sufficient to constitute probable cause, but rather stated mere conclusory statements. *Id*.

A hearing on both Motions to Suppress was conducted on November 8, 2018. 2 RR 3. At that time, the State stipulated to excising portions of the affidavit as they were from sentences included in the affidavit in reckless disregard for the truth. 2 RR 7. After the hearing, and before the time of trial, the Trial Court determined the affidavits still established sufficient probable cause without the excised statements and denied both Motions to Suppress. 2 RR 23. Testimony was re-opened and supplemented with an addition stipulation from both parties on January 17, 2019. 3 RR 5. The Trial Court entered a Finding of Fact and Conclusions of Law on February 21, 2019. CR at 43. The defendant entered a plea of guilty to the lesser included offense of Possession of a Controlled Substance, a 3<sup>rd</sup> degree felony, on February 21, 2019. CR at 45. By agreement, the defendant did not waive the right to appeal the matters raised in the pretrial motions to suppress and ruled on by the Trial Court. CR at 53, 56. Sentence was imposed in open court and the defendant was placed on deferred adjudication community supervision on April 17, 2019. CR at 73-74.

## STATEMENT OF PROCEDURAL HISTORY

The Third Court of Appeals issued an opinion on April 22, 2021, affirming the trial court's denial of Appellant's motions to suppress evidence. *Parker v. State*, No. 03-19-00293 (Tex. App. – Austin delivered April 22, 2021). Appellant filed a Motion for Extension of Time to File Petition for Discretionary Review with the Court of Criminal Appeals which was granted. The deadline was extended to July 5, 2021. Appellant filed a Petition for Discretionary Review on July 5, 2021, which was granted on ground one.

## GROUND FOR REVIEW

**ISSUE 1: Are all anticipatory search warrants are prohibited under Texas law?**

## STATEMENT OF THE FACTS

On June 1, 2017, a male subject entered a UPS facility in Eugene, Oregon and shipped two packages to 2070 Lime Kiln Road, San Marcos, Texas, and told the UPS employee that the packages contained chanterelle mushrooms. CR at 16. The shipping paperwork for both packages indicated they were shipped from “Silas Parker” to “Silas Parker” care of “Scott Cove.” *Id.* UPS employees contacted the Oregon State Police Department because they believed the packages smelled like marijuana. *Id.* Detective Jered Mclain met with the UPS employees and took custody of the parcels and paperwork. *Id.* Detective Mclain opened the parcels and found mushrooms which gave a positive result for Psilocybin. *Id.* at 17. He did not locate any marijuana. *Id.*

On June 5, 2017, Detective Mclain contacted Detective Lee Harris of the San Marcos Police Department to coordinate a controlled delivery through UPS to the San Marcos address. *Id.* Detective Harris used a law enforcement database to determine that a “Silas Graham Parker” had the 2070 Lime Kiln Road address listed on his Texas Driver’s License. *Id.* On June 7, 2017, Detective Harris obtained a search warrant (First Search Warrant (House)) which was to be executed on the expected delivery date of June 9, 2017, after he could “confirm parcel delivery to said suspected place and premises.” *Id.*

On the morning of June 9, 2017, Detective Harris and other officers from the San Marcos Police Department began conducting covert mobile surveillance of the property. 2 RR 9. The property of 2070 Line Kiln Road sits out of sight from the main roadway, so the law enforcement personnel watched for the arrival of a UPS truck and other individuals. *Id.* At 2:00pm, Detective Harris observed a UPS truck enter the property, at which point he used his phone to track the parcels on the UPS website. *Id.* After a few minutes, the UPS tracking technology indicated the parcels had been “left at the front door”. *Id.* At some point, Detective Harris knew an individual named Zachary Alfin had approached the delivery truck and took custody of the packages. *Id.* at 9-101.

Detectives then entered the premises and conducted a search relying on the First Search Warrant (House). CR at 12. A number of items were seized during the search, including two bags of mushrooms and “affirmative links” to Silas Parker, all



of which were listed on a property inventory form. *Id* at 13.

On June 21, 2017, Detective Harris obtained the Second Search Warrant (Phone) to secure Electronic Consumer Data relating to Silas Parker’s phone number: 830-385-8137. *Id* at 30-35. The affidavit he swore to when requesting the Second Search Warrant (Phone) contained information derived from the execution of the First Search Warrant (House). *Id* at 37. The Second Search Warrant (Phone) was executed, which resulted in the law enforcement agencies of Hays County obtaining location data showing the movement of the phone. 3 RR 5.

## ARGUMENT

### **ISSUE 1: Are all anticipatory search warrants are prohibited under Texas law?**

Article 18.01(b) of the Code of Criminal Procedure sets forth the conditions under which a search warrant may be issued. That article states that a search warrant may be issued only if there is a sworn affidavit setting forth facts sufficient to establish that “probable cause does in fact exist.” Tex. Code Crim. Proc. Ann. Art. 18.01(b). An “anticipatory search warrant” is based on an affidavit asserting that probable cause will exist at some future time upon the occurrence of some condition precedent, or “triggering event.” *See US v. Grubbs*, 547 U.S. 90, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006). While anticipatory search warrants are valid under federal law, see *id*, Texas law requires that items to be searched for or seized are at the designated location “at the

time the search warrant is issued.” *Davis v. State*, 202 S.W.3d 149, 155. (Tex. Crim. App. 2006). Therefore, Texas magistrates are precluded from issuing anticipatory search warrants under state law. *See Mahmoudi v. State*, 999 S.W.2d 69 (Tex. App. – Hous. 14<sup>th</sup>. 1999)

The two cases in Texas jurisprudence addressing whether the language of Texas Code of Criminal Procedure Article 18.01 prohibits anticipatory search warrants involved search warrants issued by federal magistrates. In the first, *State v. Toole*, the Court of Criminal Appeals acknowledged that the plain language of Article 18.01 does not provide for anticipatory search warrants, but declined to rule on the validity of such search warrants because the federal magistrate who issued the warrant being challenged did not have to comply with state law. *State v. Toole*, 872 S.W.2d 750, 752 (Tex. Crim. App. 1994). However, the Court did point out that Article 18.01 is a "statute of prohibition rather than authorization... [which] prohibits Texas magistrates from issuing search warrants unless certain conditions exist." *Id.* In the second, *Mahmoudi v. State*, the 14<sup>th</sup> Court of Appeals also found that federal magistrates are not bound by the Texas Code of Criminal Procedure, but clearly stated that anticipatory search warrants do "not meet the requirements of Article 18.01." 999 S.W.2d at 72.

The Court of Appeals correctly determined that anticipatory search warrants are constitutional under the 4<sup>th</sup> Amendment of the United States Constitution, but that the Court of Criminal Appeals has not addressed this issue under Texas law. This Court should in this case, as it has repeatedly in the past, exercise its authority to construe

language in the Texas Constitution to afford greater protections. *See, e.g., Richardson v. State*, 864 S.W.2d 944 (Tex. Crim. App. 1993) (holding that use of a “pen register” is a “search” under Article I, Section 9 of Texas Constitution); *Autran v. State*, 887 S.W.2d 31 (Tex. Crim. App. 1994) (providing greater protection for privacy rights in vehicle inventories than Fourth Amendment); *State v. Ibarra*, 953 S.W.2d 242 (Tex. Crim. App. 1997) (clear and convincing evidence required for consent in Texas rather than proof of voluntariness by only preponderance of evidence under Fourth Amendment). *See generally*, Reamey & Bubany, Texas Criminal Procedure 97, notes 1-2 (10th ed. 2010). As Professor Reamey put it in his article on Anticipatory Search Warrants in Texas:

The glory and the danger of federalism is that a state’s values may be expressed through its own laws. Those values are not defined entirely by a national compact. If the state believes its citizens are ill-protected by the rights guaranteed in the United States Constitution, it may afford its citizens additional protections. Accordingly, Texas procedural law in numerous ways limits the authority of law enforcement, ways that exceed the reach of the Bill of Rights to the federal constitution.

Gerald S. Reamey, The Promise of Things to Come: Anticipatory Warrants in Texas, 65 Baylor L. Rev. 473 (2013)

In this case, the warrant was issued by a Hays County magistrate, and not a federal magistrate, and therefore could not be issued unless the conditions provided for in the Code of Criminal Procedure were complied with. As stipulated to by the State, the parcels containing the Psilocybin were still in the custody of the United Parcel Service (UPS) at the time of the issuance of the warrant, and not at the residence to be searched as the affidavit suggests. 2 RR 7-8. Therefore, it is an anticipatory search

warrant, which is prohibited by Article 18.01. Law enforcement had no exigent circumstances that would have prevented them from locking down the location and getting a search warrant – especially considering neither Mr. Parker nor Mr. Cove were present.

Texas is not unique in affording its citizens greater protections than the United States Constitution. Many other states also have statutory procedures for warrants that parallel Article 18.01 in that they require concurrent probable cause. The highest court in many of those states have had occasion to address this very same issue, and held that despite the U.S. Supreme Court’s ruling that anticipatory search warrants are valid under the federal Constitution, they were unlawful under state law. *Dodson v. State*, 2006 OK CR 32, 150 P.3d 1054, 1055-59 (Okla. Crim. App. 2006) ("While the anticipatory search warrant issued in this case does not run afoul of wither the United States Constitution or the Oklahoma Constitution, it was not authorized by the plain language of our statute which specifically sets forth the requisites for when a search warrant may be issued."); *Ex parte Oswalt*, 686 So. 2d 368, 373-74 (Ala. 1996); *People v. Poirez*, 904 P.2d 880, 881-83 (Colo. 1995); *Bernie v. State*, 524 So. 2d 988, 991-92 (Fla. 1988); *State v. Scott*, 87 Haw. 80, 951 P.2d 1243, 1247-48 (1998); *People v. Ross*, 168 Ill. 2d 347, 213 Ill. Dec. 672, 659 N.E.2d 1319, 1320-22 (1995); *State v. Ramirez*, 895 N.W.2d 884, 892 (Iowa 2017) (“we have held that Iowa Code sections 808.3 and 808.4 do not authorize anticipatory warrants in Iowa”); *Kostelec v. State*, 348 Md. 230, 703 A.2d 160, 163-65 (1997).

This case is the perfect example of the dangers of anticipatory search warrants, illustrating why the Texas legislature designed article 18.01 to require probable cause to exist when a warrant is issued. If this case is affirmed, it would allow an individual to simply put a recipient's name on both the destination address and return address of a box of contraband, and set that recipient up to unknowingly be subject to both a search of their home and criminal charges. If a package arrived on the steps of the Court of Criminal Appeals with "Justices of the Court of Criminal Appeals" written as both the sender and addressee, law enforcement could be well within its power to execute a search through chambers even if no Justice took possession of that package or exhibited knowledge of its contents. If this is what the Texas legislature desires, it can follow States like Illinois and Hawaii and modify the language of Article 18.01. This Court, however, should opt to follow the Arizona Supreme Court who stated, if a "package, which was the basis for the warrant, was in the possession or control of the police at the time the affidavit was sworn to and the warrant issued, there was no crime as such being committed at that time. What [a] defendant [does] with the package after he received it would determine the extent of his criminal liability. We do not believe that it is reasonable to base a warrant upon future acts that can only come into being by actions of the persons seeking the warrant." *State v. Berge*, 130 Ariz. 135, 137, 634 P.2d 947, 949 (1981).

## PRAYER FOR RELIEF

The above premises considered, Mr. Silas Parker prays that this Court reverse the judgment of the 3<sup>rd</sup> Court of Appeals and remand this case for a harm analysis.

Respectfully Submitted,

/s/ E.G. Morris

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/s/ Angelica Cogliano

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## CERTIFICATE OF SERVICE

I certify that October 25, 2021, a copy of this brief was served via State e-filing service to Stacey Soule, the State Prosecuting Attorney, at [information@spa.texas.gov](mailto:information@spa.texas.gov).

/s/ Angelica Cogliano

Angelica Cogliano

## CERTIFICATE OF COMPLIANCE

I certify the foregoing Petition for Discretionary Review complies with Rule 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure. This document is 3180 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ Angelica Cogliano

Angelica Cogliano

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